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An individual complaints procedure

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Published in:
Griffin's view, 2007

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2007

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Vonk, G. J. (2007). An individual complaints procedure: some remarks from the perspective of the right to social security in the Netherlands. *Griffin's view*, 2007.

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AN INDIVIDUAL COMPLAINTS PROCEDURE FOR FUNDAMENTAL SOCIO ECONOMIC RIGHTS

Some remarks from the perspective of the right to social security in the Netherlands

Gijsbert Vonk*

The United Nations are considering to introducing an individual complaints procedure to the International Covenant of Economic Social and Cultural Rights. This article discusses the relevance of such a procedure for the right to social security in the Netherlands. According to the author an individual complaints procedure would have the beneficial effect that Dutch courts will give up their reluctance to apply the right to social security as a fundamental right in individual cases.

Introduction

An individual complaints protocol to the International Covenant on Economic, Social and Cultural Rights (ICESC) has been the subject of discussion since the early nineteen-nineties. However a lack of consensus has made it impossible to make any decisions regarding such a procedure¹. To overcome the deadlock the UN Commission of Human Rights decided to set up an open-ended working group to consider the possibilities regarding an optional procedure for the ICESC. In 2005 the working group published a so-called 'analytical paper'² formulating the options available for a complaints procedure. The report was discussed in February 2006. Once again the parties failed to reach consensus and the meeting closed without any conclusions or recommendations being agreed. A number of countries, including the United States and Australia, are opposed to an optional procedure. These parties' principle fear seems to be that the procedure will lead to an avalanche of complaints. Objections were also raised with respect to the limited enforceability of ICESC rights as well as the difficulty of measuring violations of it. Despite the fact that a consolidated draft proposal⁴ is still premature as far as opponents of an individual complaints protocol are concerned, the open-ended working group went ahead and drew up such a proposal in late April.⁵ This will be discussed in July 2007 during the working group's fourth session.

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¹ For a description of the discussion and developments surrounding the optional protocol see, W. Vandenhole, 'Completing the UN complaint mechanisms for human rights violations step by step: towards a complaint procedure complementing the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights*, (21) 2003-3, pp. 425-429.

² United Nations, Economic and Social Council, Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, GE.05-16464 (E) 091206, 30 November 2005.

³ Advisory Council on International Affairs, 'Universaliteit van de rechten van de mens en culturele verscheidenheid' [Universality of the rights of man and cultural diversity], 14 October 1998.

⁴ *Dutch parliamentary documents* II 2005-06, 26150, no. 39, pp. 2-3.

⁵ United Nations, Human Rights Council, Draft Optional Protocol to the International Covenant on economic, social and cultural rights, prepared by the Chairperson-Rapporteur, Catarina de Albuquerque, A/HRC/7/WG.4/2, 23 April 2007

To date the Netherlands has been just as slow in its support of the Optional Protocol. But neither has it yet definitely thrown in its lot with the opponents. In March 2007 the Ministry of Foreign affairs organised a consultation with a number of specialists in the field of socio-economic rights, representatives of the judiciary and of interest groups, such as Amnesty International to discuss the Dutch standpoint with regard to the individual complaints procedure. Such a demonstration of openness when preparing the government's position on human rights is unprecedented. Perhaps this should be understood as a sign that the Dutch government is willing to abandon its opposition?

For the consultation the present writer was invited to present his views on the individual complaints procedure from the specific angle of relevance for the fundamental right to social security. This article reflects this contribution. The spoken text has been only slightly adjusted so as to maintain the flow of the argument. The issue revolves around the question of whether an individual right of complaint is a suitable instrument for a fundamental right such as social security. And what is the added value of such a procedure to the legal remedies already available within national law? These questions will be answered in three stages. First of all the right to social security itself will be briefly considered: where does it come from and what does it include? The second stage is to list a number of developments that (should) lead to a revaluation of the fundamental right to social security in the Netherlands. Thirdly, by means of conclusion, the added value of an international complaints committee for the Netherlands will be considered.

II. The Fundamental Right to Social Security

The fundamental right to social security reflects a quality leap forward in human thinking that occurred during the 19th century. Poverty was no longer considered to be a God given situation to which one must resign oneself. The notion developed that everyone has the right to be helped in escaping from his impoverished situation. This insight is based on a number of linked insights that can be traced back to the Enlightenment: that people are free and equal; implying that each citizen should have an opportunity to develop his personal qualities; that material obstacles to this should be removed; and that people should be compensated for social and physical handicaps. Put these together and before you know it there is this right to social security:

- to which all citizens are entitled;
- and which should be organized, or at least orchestrated by the State⁶

⁶ For a historical perspective on the right to social security see Samuel Fleischacker, *A short History of Distributive Justice*, Cambridge Mass: Harvard University Press 2004.

The right to social security infers that the government must act to guarantee the means of existence. When seen in this light the scope of social security is large. In ICESCR terms it not only encompasses article 9 itself (guaranteeing everyone the right to social security) but also elements of article 10 (protection of the family, mothers and children), article 11 (the right to an adequate standard of living) as well as elements of the right to health laid down in article 12.

The right to social security as a fundamental right should be distinguished from the individual benefit entitlement. The prevailing opinion is that this entitlement cannot be derived from the fundamental right, but should be laid down in the national legal systems. On the other hand when a state is negligent in its provision of care, the fundamental right to social security can be invoked against the state to demand that individual entitlements be recognized. In the field of socio-economic rights in general, this is not only generally accepted in legal literature, but also in the constitutional case law of a number of countries, such as India, South Africa and Argentina.⁷ There can be no doubt about it: socio economic rights are justiciable. It depends upon how seriously and manifestly the standard is violated by the government. For example the well-known South African *Grootboom* case⁸ involving the uncompensated bulldozing of shacks in Cape Town. Cases heard in the Indian courts include the failure of a province to provide aid during a famine⁹ and in Argentina the right to health was invoked by citizens to defend themselves against the effects of a non-functioning drainage system.¹⁰ In all these cases the courts offered concrete remedies to those who suffered under the violation of the various social economic rights involved. In South Africa the government was ordered to provide emergency housing, the Indian province had to open the doors of its granary and in Argentina the local authorities were ordered to temporarily provide the effected municipality with 200 litres of drinking water a day. There are some excellent examples of judgments of domestic courts in which citizens could successfully rely on socio-economic rights.

III. Revaluating the Fundamental Right to Social Security in the Netherlands?

The fundamental right to social security was introduced to the Dutch legal system in the late nineteen-seventies and early nineteen-eighties of the previous century.¹¹ Since then it has largely lain dormant. It was only sporadically referred to during parliamentary debates and the Dutch courts obstinately refuse to give it the kiss of life. This marginal role is understandable from an

⁷ Cf. Fons Coomans (ed.) *Justiciability of economic and social rights, experiences from domestic systems*, Antwerpen Antwerpen-Oxford: Maastricht Centre for Human Rights 2006. An interesting overview of the most excellent examples of national court cases is contained in the last chapter of the 'analytical paper' of the 'open ended working group', United Nations, Economic and Social Council, Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, GE.05-16464 (E) 091206, 30 November 2005.

⁸ *The Government of South Africa v Grootboom*, Constitutional Court of South Africa, 2000 ICHRL 72.

⁹ *People's Union for Civil Liberties (PUCL) v. Union of India and Others*, Supreme Court of India, Writ Petition [Civil] No. 196 of 2001.

¹⁰ *Marchisio José Bautista y Orras - AMPARO*, Expediente No. 500004/36.

¹¹ The ICESCR was ratified by the Netherlands on 11 December 1978 and came into effect on 11 March 1979. The Netherlands ratified the European Social Charter that had already come into effect on 22 April 1980 and the article 19 and 20 were introduced with the amendment to the constitution in 1983.

historical point of view. The fundamental right was introduced at the very time the social security system was nearing completion. It did not form a source of inspiration for it. Before the war heated ideological debates still centred upon issues such as the need for mandatory insurance, the primary role of the state in combating poverty, the usefulness of child benefits etc.. After the war these discussions made way for unanimity with respect to the social security project. Its objective was succinctly formulated by van Rhijn, a politician who wrote a Beveridge inspired report on Dutch social security in 1948: *The community, organized in the state, is responsible for guaranteeing the means of subsistence and freedom of want for its members, on the condition that these members do everything necessary to take care of their own livelihood themselves.* The phrase is often referred to as the ultimate rationale, in Dutch: the *rechtsgrond*, of social security

Case law has produced equally little basis for honouring the fundamental right to social security. With the completion of the national social security system not the fundamental right to social security but rather the various acts of parliament became the primary reference point for settling disputes. The courts have refrained from complex mind exercises regarding the possible implications of the fundamental right to social security. The opinion of the Dutch courts still simply reads that the fundamental right does not qualify as a self-executing provision within the meaning of the Dutch Constitution.¹²

Under the influence of a number of developments the potential importance of the fundamental right to social security is growing. I will touch on three aspects.

- a. The collapse of consensus with respect to the *rechtsgrond* of social security.
- b. The gradual dilution of the entitlement to benefit as a subjective right, resulting from the growing importance of discretionary powers
- c. The increasing international acknowledgement of the right to social security as a universal right

The collapse of consensus with respect to the rationale of social security

Since the nineteen-eighties the social security system has been the subject of a reform process. The old system is in crisis. It is considered to be too expensive, not sufficiently activating, focussing on the protection of the wrong social risks etc.. Alternative approaches to public social security such as privatisation, individual savings schemes and tax relief are rolling in like waves. The previous consensus on social security is collapsing. *Van Rhijn's* old phrase is no longer an applicable basis upon which the legitimacy of all sorts of changes to the system can be determined. Instead the fundamental right to social security is launching an offensive. This became obvious for the first time in the second half of the nineteen-nineties when the public scheme for sickness insurance was privatised. During this period the Council of State forced the government to state how this operation related to article 20 of the Dutch Constitution, which embodies the right to social security. In reaction to this, the government of the day believed that privatisation should be permissible as long as the state was able to cover the negative effects

¹² For an analysis of the Dutch situation see Frank Vlemminx, 'The Netherlands and the ICESCR, why didst thou promise such a beautiful day?' in: Coomans 2006, *supra* note 7, pp. 43-66.

of the market. The preconditions were formulated very precisely. The privatisation could be ultimately realized by allowing the public sickness benefit scheme to remain as a safety net and by prohibiting employers from selecting employees at the gate on the basis of medical examinations. Subsequently, the privatisation of the sickness benefit scheme has given rise to a debate on fundamental rights at European level. The Council of Europe's committee of experts, which monitors compliance with the European Social Charter, considers the Dutch reform to be principally in conflict with the right to social security¹³. Whatever the truth may be, the fact remains that the Dutch reform process has put the fundamental right to social security in the limelight. The government has had to study the substance of this right and in doing so it appears they are able to settle the boundaries in detail and with precision, I would add: "sufficiently clear and precise".

The dilution of social security entitlements as subjective legal rights

There is an interesting trend in the evolution of the Dutch social security system. The provision of care within the scope of the Poor Law was seen as a form of charity. The scope of the assistance was determined unilaterally by the poor law boards, which had the discretionary power to do so. Tough requirements were attached to the provision of assistance in the form of public work duties. After the war the charitable character of the poor law was replaced by the acknowledgement of social assistance as a right. This was coupled with the abolition of public work duties. Since 1983 article 20, paragraph 3 of the Dutch Constitution states that all Dutch people, who are unable to provide for themselves, have a right to public social assistance.

However recently the trend seems to be reversing again. With regard to the imposition of work obligations and the determination of the level of sanctions in particular, Dutch authorities have been given unbridled discretionary powers. The workfare approach, first invented by some conservative American states, has gained a foothold in Europe. Perhaps this should be seen as a logical consequence of the activation policy. However it could also be seen as a sort of rebirth of the repressive practices that existed before the war. *Loïc Wacquant* the French sociologist teaching at Berkeley wrote about this in a worrying analysis in his book 'Punishing the Poor; from welfare state to penal state'.¹⁴ Problems are no longer tackled with a social agenda. Instead the citizen is being made fully individually responsible for his actions and the extent to which he is able to participate successfully in the community. Response to failures in this policy takes the shape of tough, interventionist measures, sanctions and penal measures, as if the prisons are going to act as a solution to the problem of poverty and social exclusion, as was the case in Dickensian times. Does the fundamental right to social security impose any boundaries to this? It is interesting to apply this question to the current Dutch proposal for participation jobs. According to this proposal the intention is to oblige social assistance beneficiaries to perform

¹³ Report of the Committee of Experts of the European Social Charter, report 1995/1996. In later reports the Committee's point of view seem to have somewhat tempered. The ILO Committee of Experts calls of for extra vigilance. See F.J.L. Pennings, *De betekenis van internationale normen voor de Nederlandse sociale zekerheid* (inaugural speech) Tilburg 2004, p. 44.

¹⁴ Translated into Dutch, but not yet (officially) in English, as *Straf de armen*, Antwerpen: EPO 2006.

mandatory work while retaining their benefit for a maximum of four years. That work is not supposed to be carried in a formal employment relationship. It will consist of various sorts of additional services, such as child minding, and street cleaning. There are probably good arguments for the proposal, but one wonders how it would work out when local authorities apply the rules too strictly and impose heavy sanctions on persons who feel that the public work duties are not suitable for them. Not to mention the suggestion made in 2005 by the former Minister of Social Affairs, De Geus, that prostitution should be accepted as suitable employment. Or the Enschede local authority that threatened to force women on social assistance to join a dating agency in the hope that they would catch a man with money of his own. The legislative proposal for participation jobs has not yet been accepted; the other cases referred to are simply scandals that received a lot of attention from the press. But should these sort of excesses ever become reality, it will be up to the courts to correct them. The fundamental right to social security is there to keep the courts on the right track. In a concrete context the courts should establish boundaries in the individual case.

The international acknowledgement of the right to social security as a universal right

In 1978 the English jurist *Francis Jacobs*¹⁵ wrote a report at the request of the Council of Europe on the extension of the ECHR to include social, economic and cultural rights. His touchstone was the appropriateness of protecting these rights through the mechanisms of the convention. This partly depended on whether the rights comply with the universality requirement. According to the author the right to social security stranded on this criterion. The report stated that in respect of foreign citizens this right is made subject to the condition of reciprocity. We can assert that the legal opinion has now taken another direction. The American Supreme Court (*Graham v. Richardson*)¹⁶, the South African Constitutional Court (*Khosa*)¹⁷ and the ECtHR (*Gaygusuz*)¹⁸, have now all confirmed the universal character of the right to social security. Discrimination on grounds of nationality is prohibited. In America and South Africa the equal treatment should be provided to long-term residents. In Europe it is as yet unclear where the boundary lies. I would not be surprised if, under the influence of the EC Court of Justice in Luxembourg, stricter requirements will be enforced. This development throws a shadow on the possibilities of denying foreign citizens access to social security schemes. In the Netherlands there are political parties and officials who cannot wait to adopt stricter criteria for foreigners. Here too, the question arises regarding the extent to which the fundamental social rights can impose boundaries. The exclusion of illegal immigrants from the right to emergency assistance on the grounds of article 16 of the Dutch Social Assistance Act is a good example of this. Under the so-called Linkage Act of 1998, foreign citizens are excluded from all collective provisions, even from social assistance as a safety net, and yes, even from a provision in the

¹⁵ The text of the report is contained in F.G.Jacobs, 'The extension of the European Convention on Human Rights to include economic, social and cultural rights', *The Human Rights Review* 1978, pp. 166-178.

¹⁶ 403 U.S. 365 (1971)

¹⁷ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*, Constitutional Court of South Africa, CCT12/03 ; CCT13/03.

¹⁸ *Gaygusuz v. Austria* ECtHR 16 September 1996, application number 17371/90

Social Assistance Act that makes it possible to extend assistance in very urgent cases to people who are excluded from entitlement to social assistance (art. 16). The appeal court for social security disputes, the Central Court of Appeal, was called upon to pronounce a judgment as to whether this is reconcilable with the right to social security for children as laid down in the ICESC (art.27). By lack of direct effect, there was no need to clarify this point.¹⁹ I consider this to be a missed opportunity. The implication of art. 27 ICESC for illegal children is still written in the stars. In the meanwhile illegal children are still denied care, even in emergency situations.

Conclusion: can the Fundamental Right be Individually applied and does this have any added Value to the Dutch Legal Remedies?

My opinion as regards the first part of this question has been stated above. The fundamental right can be individually applied. I do not accept the opinion of the Dutch courts that this right cannot be invoked in individual cases by lack of direct effect. I believe this opinion to be narrow minded, convulsive and conservative. The vagueness of the norm is largely due to the absence of jurisprudence in respect of the fundamental right: it is not given substance in case law. From this point of view the suggestion in case law that the fundamental right does not qualify for direct effect is tautological.

The acceptance of an individual complaints procedure would, I believe, be of added value to the Dutch legal remedies. It would encourage the Dutch courts to abandon their reluctance to apply fundamental social rights. I am not afraid of an avalanche of cases which would ensue from this. The fundamental right to social security will only cut its teeth on manifest forms of neglect. Whether or not there is evidence of this depends on the question of whether the policy, the legislation and the actions of the authorities continues to respect minimal state responsibilities. What objections can there be to putting this question into the hands of an international complaints committee?

¹⁹ Central Court of Appeal 24 January 2006, LJN AV0197, *Rechtspraak Sociale Verzekeringen*, 2006/84.